STATE OF MICHIGAN

COURT OF APPEALS

OAKLAND-MACOMB INTERCEPTOR DRAIN DRAINAGE DISTRICT, Plaintiff-Appellant, v RIC-MAN CONSTRUCTION, INC., and AMERICAN ARBITRATION ASSOCIATION, INC., Defendants-Appellees.	FOR PUBLICATION January 30, 2014 9:10 a.m. No. 314098 Oakland Circuit Court LC No. 2012-129662-CK Advance Sheets Version

Before: SAAD, P.J., and SAWYER and JANSEN, JJ.

SAAD, P.J.

Plaintiff Oakland-Macomb Interceptor Drain Drainage District ("Drainage District"), a public sector drainage district, seeks to enforce provisions of its agreement to arbitrate with defendant Ric-Man Construction. The American Arbitration Association (AAA) failed to appoint a lawyer-member of the arbitral panel that had the specific, specialized qualifications set forth in the parties' agreement.

I. NATURE OF THE CASE

Plaintiff's objection to the AAA's failure to comply with the contractual requirements of a specific, highly specialized arbitral agreement raises an issue of first impression for a Michigan court's application of the Federal Arbitration Act (FAA), 9 USC 1 *et seq*. That is, will our courts enforce the conditions of an arbitral agreement before the arbitral award has been issued when (1) the underlying subject matter of the arbitration involves complex technical and legal issues, (2) the arbitration agreement requires that the arbitrators possess a highly specialized professional background, and (3) the arbitration agreement specifically outlines a precise method to select said arbitrators?

Other courts that have looked at this narrow, but important, issue have made the following distinction, which informs our analysis: Courts will not entertain suits to address preaward general objections to the impartiality or expertise of an arbitrator. But when suit is brought, as here, to enforce the key provisions of the agreement to arbitrate—i.e., when the criteria and method for choosing arbitrators are at the heart of the arbitration agreement—then courts will enforce these contractual mandates. To rule otherwise would essentially rewrite the

parties' contract and rob the objecting party of this key contractual right to have a panel with the specialized qualifications necessary to make an informed arbitral ruling—which goes to the precise purpose and reason to arbitrate such technically and legally complex claims.

With this key distinction in mind and after a careful review of the comprehensive arbitration agreement,[1] we note that this is not the standard, garden-variety, simple arbitration case or arbitration agreement. To the contrary, every provision of this arbitration agreement reveals that this is a complex matter, both technically and legally. Indeed, the agreement was "tailor made" to arbitrate a complex, large, public-sector sewer construction project, and it was entered into only *after* the parties encountered multimillion-dollar disputes against each other, which they could not resolve. And the agreement provides for extensive discovery; contains unusual provisions for waivers, statute of limitations, res judicata, and recorded proceedings; and mandates detailed findings by the panel in anticipation of potential claims by and against vendors, consultants, and other interested third parties.

In addition, the arbitration agreement expressly modifies the already sophisticated complex construction rules of the AAA by mandating very specific qualifications for the three-member arbitral panel and outlining the precise manner in which the AAA must appoint these panel members. Again, the parties spelled out very particularized qualifications that the panel members must possess. Their specialized experience would make it more likely that the panel would understand the complexity of the technical and legal issues presented, and thus render an informed decision.

Any objective reading of this agreement to arbitrate makes this intention very clear. Neither the parties to the agreement nor the AAA—which agreed to act as the third-party entity to implement this arbitration agreement—could possibly misunderstand or miss the significance of having high-level, quality arbitrators to hear the matters at issue and render an informed arbitral ruling. Therefore, when the AAA blatantly and inexplicably ignored these key provisions, plaintiff had only one course of action to ensure an arbitral hearing with the type of panel envisioned: it brought suit to enforce the contract. Notwithstanding the plain language of the agreement, defendant took the position that these provisions did not clearly call for the qualifications claimed by plaintiff. It also claimed that plaintiff's prearbitration suit to enforce said provisions was premature and contrary to the FAA that, it says, disallows prearbitration litigation regarding the qualifications of an arbitrator.

We disagree with defendant on both points and with the trial court, which ruled for defendant. Instead, we hold that it is abundantly clear that the agreement to arbitrate made the specialized qualifications of the panel central and key to the entire agreement. We also hold that when, as here, a provision to arbitrate is central to the agreement, the FAA provides that it should be enforced by the courts before the arbitral hearing.

The shibboleth that this approach would encourage delays is an artful and convenient dodge. It is quite obvious here that plaintiff strongly desires arbitration and, in fact, insists on an

[1] The agreement is attached as an appendix.

arbitral hearing, but only if it is meaningful, as contemplated by the contract between the parties. We also regard defendant's contention that the AAA followed the agreement as, at best, disingenuous.

For the reasons set forth in this opinion, we reject defendant's arguments, reverse the trial court's findings, and remand to the trial court to issue an order to the AAA consistent with this opinion.

II. FACTS AND PROCEDURAL HISTORY

Plaintiff is a special-purpose public corporation established under the Drain Code, MCL 280.1 *et seq*. It owns the Oakland-Macomb Interceptor (OMI), which is part of an extensive sanitary-sewer system that delivers wastewater from suburban areas to the Detroit Water and Sewerage Department for treatment. Defendant Ric-Man is a construction company that entered into two contracts with plaintiff to build infrastructure needed to perform repairs on the OMI. These construction contracts include a brief dispute-resolution clause, which allowed the parties to agree to submit the claim to another dispute resolution process. Because plaintiff and defendant asserted serious multimillion-dollar claims against each other during the construction project, they implemented their contractual right to amend their initial contract with a much more detailed arbitration agreement. The new arbitration agreement submitted the dispute to binding arbitration, to be administered by the AAA, and it specified in § 1.3 that the arbitration panel had to consist of two construction-industry professionals and one attorney with a "*background in construction litigation*" (emphasis added). The agreement also outlined a detailed set of requirements for the AAA to follow in the event that it, and not the parties, selected an arbitrator. In the relevant sections, the agreement states:

> § 1.3.4 Any selected arbitrator will be a member of the AAA Construction Panel. The arbitration panel shall include one construction lawyer and two construction professionals agreed upon by the parties or selected in accordance with the criteria set out below. If any arbitrators are selected by AAA, selection criteria shall be applied in the following order with the next level of criteria applied *only if no candidates are available who meet the preceding criteria* [emphasis added]:
>
> > § 1.3.4.1 Construction Lawyer (1 member and 1 alternate)
> >
> > A [m]ember of the Large Complex Construction Dispute ("LCCD") panel and at least *20 years of experience in construction law* with an emphasis in heavy construction. [Emphasis added.]
> >
> > At least 20 years of experience in construction law with an emphasis in heavy construction.
> >
> > A member of the LCCD panel and at least 10 years of experience with an emphasis in heavy [c]onstruction.
> >
> > At least 10 years of experience with an emphasis in heavy [c]onstruction.

> A member of the LCCD panel and at least 20 years of experience in construction law with some experience in heavy construction.
>
> At least 20 years of experience in construction law with some experience in heavy construction.
>
> A member of the LCCD panel and at least 10 years of experience with some experience in heavy construction.
>
> At least 10 years of experience with some experience in heavy construction.

Accordingly, the key provisions—and those provisions directly pertinent to this appeal—concern the composition and selection of the arbitral panel. If the parties could not agree on two construction professionals and one construction lawyer, then the AAA would choose a panel member that met the parties' stipulated qualifications. And, in order to ensure that the most qualified available lawyer was chosen, the arbitration agreement specifies the declining, but minimal order of qualifications in the event a lawyer with all the desired qualifications is unavailable. Taken together,[2] these provisions obviously attest to the importance and centrality of the qualifications of the arbitrators to the parties' agreement to arbitrate. The central point of these provisions is that the parties agreed that, if available, the lawyer-member of the three-member arbitral panel must (1) be an attorney with experience in construction litigation, (2) possess 20 years' experience in construction law with an emphasis in heavy construction, and (3) be a member of the Large Complex Construction Dispute panel.

These portions of the arbitration agreement were triggered in January 2012, when the Drainage District filed its demand with the AAA for arbitration against Ric-Man. Both parties selected the two construction-industry-professional arbitrators from a list supplied by the AAA. But they could not agree on the construction-litigator arbitrator, thus leaving that position to be filled by the AAA in accordance with the procedures, methodology, and selection criteria specified in the arbitration agreement.

In August 2012, the AAA notified the Drainage District and Ric-Man that it had chosen Michael Hayslip as the construction-litigator member of the panel. Hayslip unquestionably did not meet the qualification requirements of the contract. Though Hayslip was admitted to the Ohio bar in 1994, and worked in the construction industry throughout his career,[3] he had no background in construction litigation—much less 20 years of experience with an emphasis in

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[2] "We read contracts as a whole, giving harmonious effect, if possible, to each word and phrase." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 50 n 11; 664 NW2d 776 (2003).

[3] After plaintiff brought suit, the AAA also chose Thomas Weiers as an alternate attorney-arbitrator. At the time of his appointment, Weiers had 25 years' experience as a construction-industry attorney, with knowledge of both heavy construction and construction litigation, and was a member of the AAA's LCCD panel.

heavy construction, which is a key qualification required by the arbitration agreement—nor was he a member of the AAA's LCCD panel. The Drainage District immediately objected to the AAA's disregard of the arbitration agreement, but the AAA nonetheless reaffirmed its appointment of Hayslip.

Plaintiff subsequently filed suit against Ric-Man and the AAA in October 2012 to enforce its contractual right to have an attorney with the aforementioned qualifications on the panel. Plaintiff sought (1) a declaration that the AAA was required to appoint a lawyer with a background in construction litigation in compliance with the arbitrator-selection procedures specified in the arbitration agreement, (2) an injunction ordering the AAA to do the same, and (3) a judgment of summary disposition under MCR 2.116(C)(10), stating that Hayslip lacked the necessary experience required by the agreement and that any award issued by the current arbitration panel was void.

Plaintiff also alleged that the AAA failed to follow the arbitrator-selection process outlined in the agreement, pointing to Hayslip's relative lack of experience when compared to the alternate attorney-arbitrator, Weiers. Of course, as noted, in addition to his lack of experience in construction litigation, Hayslip's professional background did not meet the first two criteria the AAA was supposed to take into account when choosing arbitrators: (1) he was not a Large Complex Construction Dispute panel member with at least 20 years of experience in construction law, and (2) he did not have at least 20 years of experience in construction law with an emphasis in heavy construction. Whereas Hayslip did not satisfy either qualification, Weiers possessed both.

In response, Ric-Man stated that a court cannot second-guess an arbitration decision and that the AAA followed the specified arbitrator-selection process. It contended that the arbitration agreement did not actually require the attorney-arbitrator to have construction-litigation experience, and that plaintiff sued simply because it was unhappy with the selected group of arbitrators.

The trial court rejected plaintiff's arguments, and held, erroneously, that the AAA's selection of Hayslip complied with the plain language of the arbitration agreement. In so doing, it ruled that there was no language in the arbitration agreement requiring the AAA to appoint a construction lawyer with 10 to 20 years of construction-litigation experience. The trial court denied plaintiff's motion for summary disposition and dismissed the case.

Plaintiff filed an appeal in January 2013, claiming that the trial court erred when it denied the motion for summary disposition and dismissed the complaint. Specifically, plaintiff requests that our Court order the AAA to comply with the arbitration agreement.

III. STANDARD OF REVIEW

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Hackel v Macomb Co Comm*, 298 Mich App 311, 315; 826 NW2d 753 (2012). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a

trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

The interpretation of a contract presents a question of law that is reviewed de novo. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006). "Arbitration agreements are generally interpreted in the same manner as ordinary contracts. They must be enforced according to their terms to effectuate the intentions of the parties." *Bayati v Bayati*, 264 Mich App 595, 599; 691 NW2d 812 (2004) (citation omitted). See also *Equal Employment Opportunity Comm v Frank's Nursery & Crafts, Inc*, 177 F3d 448, 460 (CA 6, 1999) ("Because courts are to treat agreements to arbitrate as all other contracts, they must apply general principles of contract interpretation to the interpretation of an agreement covered by the FAA.").

IV. ANALYSIS

Because both the Drainage District and Ric-Man agree that this case involves materials shipped through interstate commerce and is thus is governed by the FAA,[4] we begin our analysis with the plain language of the applicable statute. Section 5 of the FAA, which governs the appointment of arbitrators, states: "*If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed . . . .*" 9 USC 5 (emphasis added). Significantly, to implement the mandate of § 5, the use of the term "shall" indicates that compliance with the methods specified in the agreement is mandatory.[5] Further, to give life to this mandate, § 4 of the FAA permits "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration" to "petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 USC 4.

Therefore, under §§ 4 and 5 of the FAA, courts have a statutory obligation to protect arbitral parties from abuse by the third-party agency conducting the arbitration. See *Morrison v Circuit City Stores, Inc*, 317 F3d 646, 678 (CA 6, 2003). If courts were to refuse prearbitration relief, arbitration agencies could ignore with impunity the specific terms of the arbitration agreement, thus effectively modifying the agreed-upon terms without each party's consent. See *id*. at 678-680; *Farrell v Subway Int'l, BV*, unpublished opinion of the United States District Court for the Southern District of New York, issued March 23, 2011 (Docket No. 11 Civ 08),

[4] See *Burns v Olde Discount Corp*, 212 Mich App 576, 580; 538 NW2d 686 (1995) (stating that "[t]he [FAA] governs actions in both federal and state courts arising out of contracts involving interstate commerce"). "State courts are bound under the Supremacy Clause, US Const, art VI, § 2, to enforce the substantive provisions of the federal act." *Id*.

[5] "The word 'shall' is generally used to designate a mandatory provision . . . ." *Old Kent Bank v Kal Kustom Enterprises*, 255 Mich App 524, 532; 660 NW2d 384 (2003).

pp 10-11 ("[F]ederal law directs that the Court enforce the selection of the arbitrator in accordance with the terms of the [parties'] Agreement . . . .") citing 9 USC 5; and *Jefferson-Pilot Life Ins Co v LeafRe Reinsurance Co*, unpublished opinion of the United States District Court for the Northern District of Illinois, issued November 20, 2000 (Docket No. 00 C 5257), p 4 ("The [FAA] clearly states that contractual provisions for the appointment of an arbitrator 'shall be followed.' "), quoting 9 USC 5. To prevent such a material alteration of the contract, in cases in which the "parties have agreed to arbitrate, but disagree as to the operation or implementation of that agreement," a court can remove an arbitrator before an award has been granted. *B/E Aerospace, Inc v Jet Aviation St Louis, Inc*, unpublished opinion of the United States District Court for the Southern District of New York, issued July 1, 2011 (Docket No. 11 Civ 4032), p 3 (citations and quotation marks omitted).

Accordingly, a party may petition a court for relief before an arbitral award has been made if (1) the arbitration agreement explicitly specifies detailed qualifications the arbitrator must possess, and (2) the third-party arbitration administrator fails to appoint an arbitrator that meets these specified qualifications. Therefore, a court may issue an "order, pursuant to § 4 of the FAA, requiring that the arbitration proceedings conform to the terms of the arbitration agreement entered into by the parties." *Morrison*, 317 F3d at 678.

To hold otherwise under these facts would negate the purpose of arbitration: parties make arbitration agreements with the expectation that the third-party arbitral agency will honor important provisions of the agreements. If that agency disregards the explicit terms of the arbitration agreement—terms that were central to the initial contract between the parties—the disadvantaged party must have some access to judicial relief, and relief can be effective only before the arbitral hearing.

In such cases—as here, and contrary to defendant's argument and the trial court's ruling—it is not premature to give the disadvantaged party access to judicial relief before an arbitral award has been made.[6] Essentially, this is the only opportunity the objecting party has to

[6] Our ruling conflicts with a decision of the United States Court of Appeals for the Fifth Circuit, which held that parties generally may not challenge the appointment of an arbitrator before an arbitral award is issued. *Gulf Guaranty Life Ins Co v Conn Gen Life Ins Co*, 304 F3d 476, 489-490 (CA 5, 2002) (holding that "the FAA does not expressly provide for court authority to remove an arbitrator prior to the issuance of an arbitral award" and "does not expressly endorse court inquiry into the capacity of any arbitrator to serve prior to issuance of an arbitral award") (emphasis omitted). As the Fifth Circuit explained, this narrow interpretation of a court's authority in the preaward stages of an FAA dispute prevents "endless applications [to the courts] and infinite delay" and also stops overly litigious parties from bringing lawsuit after lawsuit to delay arbitration. *Id*. at 492 (citations and quotation marks omitted).

As noted, we do not find this analysis applicable to or persuasive under the specific circumstances of our case. See *Truel v City of Dearborn*, 291 Mich App 125, 136 n 3; 804 NW2d 744 (2010) (noting that "[d]ecisions from lower federal courts are not binding but may be considered persuasive"). As noted, requiring an objecting party to wait until an arbitral award

demand an arbitration panel that conforms to the arbitration agreement. If the objecting party waits until the award has been made, it is very improbable that a court will offer relief. See *Bell v Seabury*, 243 Mich App 413, 421-422; 622 NW2d 347 (2000) (stating that "arbitral awards are given great deference and courts have stated unequivocally that they should not be lightly set aside"); and *Dawahare v Spencer*, 210 F3d 666, 669 (CA 6, 2000) (holding that "[a]n arbitration decision must fly in the face of established legal precedent for [a court] to find manifest disregard of the law") (citations and quotation marks omitted). Thus, to prevent the party from receiving prearbitration relief would undermine the very purpose of an arbitration agreement, which is to ensure swift extrajudicial resolution of a dispute under bargained-for terms. See *City of Bridgeport v Kasper Group, Inc*, 278 Conn 466, 485; 899 A2d 523 (Conn 2006) (stating that "the primary goal of arbitration . . . is to provide the efficient, economical and expeditious resolution of private disputes") (citation and quotation marks omitted). And, here, contrary to the trial court's ruling, the agreement to arbitrate made it very clear that the lawyer member of the panel must have specific and substantial experience in construction litigation—and yet the AAA chose a lawyer with no such experience.

Accordingly, the AAA obviously ignored the arbitration agreement when it made Hayslip the attorney arbitrator. The AAA could have easily corrected its failure to comply with the arbitration agreement when the Drainage District protested Hayslip's selection, but it did not. Evidently, there were attorneys available to serve as arbitrators who met all the conditions of plaintiff and defendant's contract, as demonstrated by the AAA's decision to make Weiers—a lawyer with a "background in construction litigation"—the alternate attorney-arbitrator.[7] The AAA's refusal to comply with the arbitration agreement's stated terms robbed the Drainage District of its bargained-for terms, and AAA's repudiation of its obligation cannot be sanctioned by this Court.

V. CONCLUSION

Pursuant to FAA §§ 4 and 5, plaintiff may enforce the precise language of the arbitration contract relating to the qualifications of the arbitrators and the method of choosing the arbitrators. Accordingly, we reverse and remand to the trial court to issue an order to the AAA requiring it to appoint an arbitral panel member who meets the criteria called for in the arbitration agreement, so that any subsequent arbitration will "proceed in the manner provided

has been issued before bringing a claim related to the composition of the arbitral panel, when said expertise is critical to a fully informed arbitral hearing, essentially robs the party of any opportunity to receive judicial relief. *Guaranty* also evinces an unwarranted lack of faith in the competence of our judiciary to distinguish between real and serious objections, as here, and frivolous developing tactics. We trust that in most cases, as here, the distinction is clear and obvious, and that courts should provide relief under the FAA.

[7] As noted, Weiers was appointed as an alternate attorney-arbitrator *after* this litigation began. Our analysis might have been different if, on appointing Hayslip, the AAA had told plaintiff and defendant Ric-Man that it was unable to find any arbitrators that satisfied the contract terms. The AAA did not do so, however, and Ric-Man does not make this allegation on appeal—in fact, Ric-Man continues to maintain that Hayslip was qualified to serve as an arbitrator under the terms of the arbitration agreement, which he clearly is not.

for in such agreement." 9 USC 4; see also *Morrison*, 317 F3d at 678. We also award plaintiff its costs and attorney fees to be assessed by the trial court upon remand, which shall include the costs and attorney fees at both the trial and appellate level.

Reversed and remanded. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ David H. Sawyer